

U.S. Bank N.A. v Roussopoulos
2016 NY Slip Op 32116(U)
August 1, 2016
Supreme Court, Queens County
Docket Number: 702966/2015
Judge: Robert J. McDonald
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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 34**

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U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR BANC OF AMERICA FUNDING
CORPORATION 2007-4,

BY: McDONALD, J.

Index No.: 702966/2015

Plaintiff,

Motion Date: 7/25/16

- against -

Motion No.: 124

PARASCHOS ROUSSOPOULOS, PARASKEVI
ROUSSOPOULOS, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE,

Motion Seq.: 1

JOHN DOE (being fictitious, the names
unknown to Plaintiff intended to be
tenants, occupants, persons or
corporations having or claiming an
interest in or lien upon the property
described in the complaint or their
heirs at law, distributees, executors,
administrators, trustees, guardians,
assignees creditors or successors,

Defendants.

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The following electronically filed documents numbered 32 to 82 read on this motion by plaintiff for an Order granting plaintiff summary judgment pursuant to CPLR 3212, dismissing the defenses asserted in the answer pursuant to CPLR 3211(b), and treating the answer as a limited appearance, appointing a Referee to determine the amount due and to ascertain whether the premises may be sold in parcels; and amending the caption; and on this cross-motion by defendant Paraschos Roussopoulos for an Order denying plaintiff's motion for summary judgment, and dismissing the Complaint pursuant to CPLR 3211(a)(3):

Papers
Numbered

Notice of Motion-Affirmation-Memo. of Law-Exhibits...	EF 32 - 54
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 55 - 60
Affirmation in Opposition to Cross-Motion-Exhibits...	EF 61 - 71
Plaintiff's Affirmation in Reply.....	EF 72 - 82

This is an action to foreclose a mortgage encumbering real property located at 23-10 23rd Avenue, Astoria, NY 11105.

Based on the record before this Court, on January 24, 2007, defendant Paraschos Roussopoulos (defendant borrower) obtained a loan from American Brokers Conduit in the principal amount of \$632,000. Defendants Paraschos Roussopoulos and Paraskevi Roussopoulos (collectively hereinafter defendants) also executed a mortgage encumbering the subject premises. Plaintiff alleges that it is the holder of the mortgage and underlying obligation and that defendant defaulted under the terms of the note and mortgage by failing to make the monthly installment payment due on September 1, 2011 and continuing thereafter. As a consequence, plaintiff elected to accelerate the entire mortgage debt.

On March 30, 2015, plaintiff commenced this action by filing a summons and complaint and notice of pendency. All defendants, including occupants "John Doe" and "Jane Doe", were duly served and failed to appear or otherwise move and their time to do so has expired, except for defendant borrower who interposed an answer with affirmative defenses dated September 10, 2015.

In support of the motion, plaintiff submits an affidavit from Armenia L. Harrell, Vice President Loan Documentation of Wells Fargo Bank, NA, the servicing agent to plaintiff. Armenia Harrell affirms that she personally reviewed Wells Fargo Bank, NA's business records, and plaintiff was in possession of the promissory note on March 30, 2007. She further affirms that she reviewed the 90-day pre-foreclosure notice that was sent to defendant borrower by first-class mail and also by certified mail. A notice of default was also mailed to defendants.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to foreclose through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]; Layden v Boccio, 253 AD2d 540 [2d Dept. 1998]; State Mortgage Agency v Lang, 250 AD2d 595 [2d Dept. 1998]).

Plaintiff demonstrated proper service of the summons and complaint. Plaintiff also demonstrated through admissible evidence that it was the holder of the note when the action was commenced. Additionally, Armenia Harrell affirmed that there was in fact a default under the terms of the note and mortgage. As

such, plaintiff established its prima facie case.

In opposition, defendant borrower contends that plaintiff lacks standing, plaintiff failed to establish that the note was physically delivered to plaintiff, Armenia Harrell's affidavit is defective, and plaintiff failed to comply with RPAPL 1304. Defendant himself also submits an affidavit in support of the cross-motion to dismiss the action.

"Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief" (Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 [2d Dept. 2014][internal citations omitted]; see Midfirst Bank v. Agho, 121 A.D.3d 343 [2d Dept. 2014]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the underlying note at the time the action is commenced (see Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 [2d Dept. 2014]; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2d Dept. 2013]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]).

This Court finds that the evidence submitted by plaintiff, including a copy of the note and the affidavit of Armenia Harrell affirming that plaintiff was in possession of the note on March 30, 2007, is sufficient to establish standing to commence the action (see Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]). Since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto, plaintiff established its standing to commence the within action (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2d Dept. 2012]; U.S. Bank, NA v Sharif, 89 AD3d 723[2d Dept 2011]).

Defendant borrower's challenge to Armenia Harrell's affidavit is meritless. "[A] witness who is familiar with the practices of a company that produced the records at issue, and who generally relies upon such records, may have the requisite knowledge to meet the CPLR requirements for the admission of a business record, provided that the witness can also attest that (1) the record was made in the regular course of business; (2) it was the regular course of business to make such record; and (3) the record was made contemporaneously with the relevant event, thereby assuring its reliability" (People v Brown, 13 NY3d 332, 341 [2009]). The factual allegations set forth in the affidavit, including a personal review of the servicer's records, sufficiently established the admissibility of Armenia Harrell's statements under the business records exception to the hearsay rule (see Portfolio Recovery Assoc., LLC v Lall, 127 AD3d 576

[1st Dept. 2015]; Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc., 30 AD3d 336 [1st Dept. 2006]; Bank of Am., NA v. Maeder, 16 NYS3d 791 (Sup. Ct., Suffolk Cnty. 2015)).

Additionally, plaintiff has submitted the power of attorney to demonstrate that Wells Fargo Bank, N.A. acted as attorney-in-fact for plaintiff, and thus, could execute that affidavit of merit (see Aurora Loan Servs., LLC v Taylor, 114 AD3d 627 [2d Dept. 2014]); Wells Fargo Bank, N.A. v Arias, 121 AD3d 973 [2d Dept. 2014]; HSBC Bank USA, N.A. v Sage, 112 AD3d 1126 [3d Dept. 2013]).

In any event standing has also been established via plaintiff's counsel's certification of the note. Plaintiff's counsel, Steven Rosenfeld, Esq., affirms that he held the original wet-ink note on March 18, 2015, which was prior to commencement, and then compared a copy of same and certified it to be a true copy of the original in accordance with CPLR 2105. He states that on March 31, 2015, the original note was mailed back to plaintiff's agent. Accordingly, plaintiff has demonstrated its standing as it was the holder of the note, which was endorsed to plaintiff and then endorsed in blank, prior to and at the time the action was commenced.

Defendant borrower also contends that plaintiff has not established that the 90-day notice was mailed in accordance with RPAPL 1304. RPAPL 1304 provides that at least 90 days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011]). "[P]roper service of the RPAPL § 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (Id. at 107). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (see Residential Holding Corp. v Scottsdale Ins. Co., 286 AD2d 679 [2d Dept. 2001]).

Plaintiff submits the affidavit of James Green, the Vice President Loan Documentation of Wells Fargo Bank, NA dba America's Servicing Company, the servicer for plaintiff, to demonstrate compliance with RPAPL 1304. He affirms that based on his personal review of the servicer's business records, a notice as required by RPAPL 1304 was sent to defendants at the subject property by both first class mail and certified mail on September 22, 2014. He further affirms that the notice was filed with the

Superintendent of Banks within three business days of mailing. A copy of the Proof of Filing Statement was submitted and demonstrates that the notice was filed on September 22, 2014. As Mr. Green has identified that the servicer's business records were personally reviewed and that the notice was sent to defendants in compliance with RPAPL 1304, plaintiff presented sufficient proof that it complied with RPAPL 1304. Defendant's conclusory denial of receipt of the 90-day notice lacks the factual specificity and detail required to rebut the prima facie proof of proper mailing set forth in Mr. Green's affidavit (see ACT Props., LLC v Garcia, 102 AD3d 712 [2d Dept. 2013]; Bank of N.Y. v Espejo, 92 AD2d 707 [2d Dept. 2012]; Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept. 2010]).

In his own affidavit, defendant borrower further contends that he did not receive a Good Faith Estimate in violation of the Real Estate Settlement Procedures Act (RESPA), he did not receive the right to rescind the mortgage in a timely manner, he cannot find a notice of pendency filed within the last three years, he did not receive the summons and complaint, and he did not receive a notice to attend a settlement conference. This Court finds that defendant borrower's affidavit is conclusory and insufficient to create an issue of fact. Moreover, defendant borrower submitted an answer without contesting personal jurisdiction and defendant borrower's counsel appeared at four settlement conferences until this matter was released from the settlement conference part on February 19, 2016 because defendant failed to submit a full and complete loan modification packet.

Accordingly, plaintiff's motion for summary judgment is granted and the affirmative defenses contained in defendant's answer are stricken. All remaining defendants are deemed to be in default. Plaintiff's application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted and the caption shall be amended as proposed.

Defendant Paraschos Roussopoulos' cross-motion is denied.

The Order of Reference has been signed simultaneously herewith.

Dated: August 1, 2016
Long Island City, N.Y.

ROBERT J. McDONALD
J.S.C.